

STATE OF MICHIGAN
COURT OF APPEALS

RICKY ALAN AMOLSCH,

Plaintiff-Appellee,

v

ALLAN J. WARNICK, D.D.S.,

Defendant-Appellant.

UNPUBLISHED

April 27, 1999

No. 203198

Wayne Circuit Court

LC No. 96-615632 NO

Before: Hood, P.J., and Holbrook, Jr., and Whitbeck, JJ.

PER CURIAM.

In this gross negligence action, defendant-appellant Allan J. Warnick, D.D.S. (“Warnick”) appeals by leave granted an order denying his motion for summary disposition. Warnick contends that summary disposition was appropriate because, as a forensic odontologist employed by the Wayne County Medical Examiners Office, he owed no individual duty to plaintiff-appellee Ricky Alan Amolsch (“Amolsch”), a one-time suspect in a murder case. We agree and reverse and remand for entry of an order granting summary disposition.

I. Basic Facts And Procedural History

In late August of 1994, Jane Marie Fray was murdered. An autopsy revealed that she had been stabbed twenty-two times, strangled with a heating pad cord, and bitten on the face between her left eye and ear. Warnick photographed and took bite mark impressions from Fray’s face. Thereafter, pursuant to a search warrant, Warnick performed an oral examination of Amolsch, charted his dentition, took bite registrations and impressions of the maxillary and mandibular teeth, and took intra and extra oral photographs. Warnick ultimately concluded that the bite marks on Fray’s face matched Amolsch’s dentition. As a result, Amolsch was charged with first-degree murder. After spending ten months in jail, Amolsch was released when another suspect came under suspicion and a second review was performed by a different forensic odontologist, who opined that the bite marks on Fray’s face matched the dentition of the second individual as opposed to that of Amolsch. Amolsch then sued Warnick, alleging gross negligence.

Warnick moved for summary disposition arguing that pursuant to the public-duty doctrine he owed no individual duty to Amolsch. In the alternative, Warnick argued that his conduct was protected by an absolute immunity. The trial court denied Warnick's motion for summary disposition.

II. Standard Of Review

Warnick moved for summary disposition pursuant to MCR 2.116(C)(8). This Court reviews the grant or denial of a motion for summary disposition de novo. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993), *aff'd* 446 Mich 482 (1994). Pursuant to MCR 2.116(C)(8), summary disposition may be granted on the grounds that the opposing party "has failed to state a claim on which relief can be granted." Accord, *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which can be drawn from the facts. *Simko, supra*; *Marcelletti v Bathani*, 198 Mich App 655, 658; 500 NW2d 124 (1993). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

The question whether a duty exists is one of law for the court. *Gazette v Pontiac*, 212 Mich App 162, 170; 536 NW2d 854 (1995). "In a negligence action, summary disposition properly is granted pursuant to MCR 2.116(C)(8) if it is determined as a matter of law that the defendant owed no duty to the plaintiff." *Id.*

III. Duty

A. Existence Of A Duty

(1) *The Public Duty Doctrine*

An essential element of a negligence claim is the existence of a duty owed to the plaintiff. *Koenig v South Haven*, 221 Mich App 711, 729; 562 NW2d 509 (1997). Thus, before even reaching the issue of Warnick's alleged gross negligence¹, Amolsch must show that Warnick owed a duty to him. *Blackwell v Citizens Ins Company of America*, 457 Mich 662, 667-668; 579 NW2d 889 (1998). We hold that the public-duty doctrine precludes a finding that Warnick owed an individual duty to Amolsch that would permit Amolsch to pursue a claim against him.

In *White v Beasley*, 453 Mich 308; 552 NW2d 1 (1996), the Michigan Supreme Court held that the public duty doctrine would generally continue to be recognized in Michigan. *Id.* at 313 (Brickley, C.J., joined by Riley and Weaver, JJ.), 325-326 (Boyle, J.), 330 (Cavanagh, J., joined by Mallett, J.). The public duty doctrine provides:

[t]hat if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages. [*Id.* at 316 (Brickley, C.J.), quoting 2 Cooley, Torts (4th ed), § 300, pp 385-386.]

The performance of forensic dental identification by an employee of a county medical examiner's office is a duty to the public at large, not to a particular individual. Thus, the public-duty doctrine, absent any applicable exception, precludes a finding that Warnick owed a duty to Amolsch.

(2) *The Special Relationship Exception*

Amolsch contends that the special relationship exception to the public-duty doctrine applies in this case. For the following reasons, we disagree. The special relationship exception "exposes a government employee to liability for the employee's actions whenever a court finds that the government employee has a 'special-relationship' with the plaintiff." *White, supra* at 319 (Brickley, C.J.), 328 (Boyle, J.). The following elements must be present in order to find that a special relationship has been created between a public employee and a private individual:²

(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;

(2) knowledge on the part of the municipality's agent that inaction could lead to harm;

(3) some form of direct contact between the municipality's agents and the injured party; and

(4) that party's justifiable reliance on the municipality's affirmative undertaking. . . [*White, supra* at 320 (Brickley, C.J.) (citation omitted).]

The facts in this case do not warrant a finding of a special relationship between Amolsch and Warnick. Warnick did not, through promises or acts, agree to act on behalf of Amolsch when performing the forensic dental evaluation.

Under substantially similar facts, this Court in *Reno v Chung*, 220 Mich App 102; 559 NW2d 308 (1997), lv granted 457 Mich 863 (1998)³ found that the special relationship exception did not apply to a medical examiner who performed an autopsy of a murder victim. The results of the autopsy tended to implicate the plaintiff in the murder. See *id.* at 104.

In *Reno*, the plaintiff came home from shopping and discovered that his wife and daughter had been repeatedly stabbed. The daughter's throat had been cut. The plaintiff told investigators that his daughter's dying words were that an acquaintance was the perpetrator. *Reno, supra* at 104. The

defendant, who performed the autopsy, informed the police that the wounds on the daughter's neck would have made it impossible for her to talk. *Id.* On the basis of this information, "the authorities" believed that the plaintiff was lying. Consequently, he was arrested, charged with the murders, and held without bond. The plaintiff was eventually released and the charges dropped when the prosecutor obtained a second opinion from both a pathologist and an otolaryngologist that the daughter would have been able to talk despite her neck injuries. *Id.* The plaintiff filed suit alleging that the defendant committed gross negligence that resulted in his wrongful incarceration. *Id.*

This Court held that because no special relationship existed between the plaintiff and the defendant, the public duty doctrine precluded the plaintiff's suit. *Reno, supra* at 105-106. The Court stated that, at a minimum, the plaintiff must show "some contact between the official involved and the victim and reliance by the victim upon the promises or actions of the official." *Id.* at 105. It then applied that proposition to the facts of the case before it:

In this case, there was no special relationship between plaintiff and defendant. The parties never had direct contact with one another, and plaintiff never relied on defendant's actions. Instead, as part of her public duty to detect crime and obtain evidence, defendant's relationship was with plaintiff's adversary, the prosecutor's office. Defendant owed a duty to the general public to make an investigation into the cause and manner of Robin's death, MCL 52.202; MSA 5.953(2), by performing the autopsy and "carefully reduc[ing] . . . to writing every fact and circumstance tending to show the condition of the body," MCL 52.205(3); MSA 5.953(5)(3). While defendant's incorrect autopsy findings may have breached the duty she owed the general public, in the absence of a duty owed to plaintiff individually, plaintiff failed to set forth a cognizable claim of negligence. [*Id.* at 105-106 (citations omitted).]

We are persuaded by the reasoning in *Reno*. While Warnick did have direct contact with Amolsch, the second requirement of the *Reno* analysis has not been satisfied. Amolsch was not in a position to legitimately rely on Warnick's conclusions. As in *Reno*, Warnick's relationship was with the government, not Amolsch. Under these facts, Amolsch has failed to establish the existence of a special relationship and, therefore, no cognizable claim against Warnick exists. *Reno, supra* at 106.

Amolsch contends that the opinion in *Reno* is distinguishable because in this case, unlike *Reno*, Warnick had direct contact with Amolsch. However, as we note above, the test this Court articulated in *Reno* has two prongs: direct contact *and* legitimate reliance. Here, the element of legitimate reliance is missing.

B. Assumption Of Duty

Notwithstanding the resolution of the application of the public duty doctrine, Amolsch argues that Warnick owed a duty to Amolsch because Warnick *assumed* a duty. We hold that the "assumed duty" doctrine does not apply to the facts of this case. Amolsch relies upon section 324A of the Restatement Torts, 2d, in support of his theory that Warnick assumed a duty of due care specifically for

Amolsch's benefit. In *Smith v Allendale Mut Ins Co*, 410 Mich 685, 705; 303 NW2d 702 (1981), the Michigan Supreme Court explained this provision of the Restatement:

Section 324A of the Restatement Torts, 2d, provides that, in certain circumstances, one who undertakes to render services to another which he should recognize as necessary for the protection of a third person is subject to liability if his "failure to exercise reasonable care to perform his undertaking" results in physical harm to the third person.

For the same reasons that a special relationship did not exist in the public duty analysis, the assumption of duty doctrine also does not apply. Warnick did not, with regard to the accuracy of his forensic conclusions, undertake to render services for the protection of Amolsch. As was the case in *Reno*, Warnick's relationship was with the government and not with the plaintiff. Further, Warnick was attempting to investigate the cause of death for the benefit of the public at large, not for the benefit of Amolsch as an individual. *Reno, supra* at 105-106. Under these facts, Amolsch's theory that Warnick voluntarily assumed the asserted duties is not viable.

As we have found that Warnick owed no individual duty to Amolsch as to the accuracy of his forensic conclusions, it is unnecessary for us to address Warnick's alternative issue that his conduct was protected by an absolute privilege.

IV. Conclusion

Amolsch ends his brief to us with an impassioned plea:

Defendant Warnick, for whatever reason, crossed the line between prosecution and persecution, turning a system of justice into a system of oppression. In so doing, he trampled upon the rights of Ricky Amolsch and caused him enormous, horrific harm. Ricky Amolsch now turns to you jurists, simply seeking and demanding a fair trial in his quest for a measure of justice. No self-respecting system of justice would deny him access to the courts and to our cherished jury system.

We agree that Amolsch's allegations in his case are horrific and, if true, call into question Warnick's judgment, Warnick's competence and perhaps even Warnick's motivation. These questions, however, are not before us, nor should they be as we must accept Amolsch's allegations as true and we must accept any reasonable inferences or conclusions that can be drawn from the facts alleged in Amolsch's complaint. Rather, we must decide two related questions of law: whether there was a special relationship between Warnick and Amolsch that takes this case out of the public duty doctrine and whether Warnick assumed a duty to Amolsch.

As to the former, we hold that there was no showing that Amolsch relied upon Warnick in any particularized way that is distinguishable from the generalized reliance that the public at large reposes in its government and its public officials. While—when we accept Amolsch's allegations as true—this generalized reliance may be misplaced in the case of Dr. Warnick, that is a matter to be resolved by his governmental employers. Simply put, in the absence of a special relationship between Amolsch and

Warnick, it is not a proper function of the judicial system to convert a tort action into an instrument of punishment or discipline. As was the case in *Reno*, Warnick's allegedly incorrect findings may have breached the duty he owed to the general public, but in the absence of a particularized duty owed to Amolsch *individually*, Amolsch failed to set forth a cognizable claim of negligence.

Much the same reasoning applies to Amolsch's assumption of duty argument. Warnick's relationship was with his governmental employers and he undertook to render no services for, or on behalf of, Amolsch. When we accept Amolsch's allegations of gross and active negligence as true, then Warnick performed his responsibilities in a truly reprehensible fashion. And yet, whether Warnick performed poorly—even execrably—or well, the simple fact remains that nothing he did was for, or on behalf of, Amolsch *individually*. Rather, his investigation fell squarely within his general responsibilities to the public at large and he assumed no particularized duty to Amolsch.

We observe that our ruling does not deny Amolsch his access to the courts. We do, however, hold that Amolsch's claims are so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. The effect of this holding is that, as a matter of law, those claims cannot go to a jury. We can reach no other conclusion—even when faced with horrific facts of the type that Amolsch alleges—without sacrificing the logic and force of directly applicable precedent to the emotional demand of result and result only. This is a sacrifice that no self-respecting system of justice can, ever, afford to make and we will not—indeed, we cannot—make it.

We reverse and remand for entry of an order granting summary disposition under MCR 2.116(C)(8) in favor of Warnick. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Donald E. Holbrook, Jr.

/s/ William C. Whitbeck

¹ Warnick, as the chief forensic odontologist for the Wayne County Medical Examiner's office, was a governmental employee. By statute, government employees and officers are immune from tort liability while engaged in governmental functions if they are acting or reasonably believe they are acting within the scope of their authority and their conduct falls short of gross negligence. MCL 691.1407(2); MSA 3.996(107)(2).

² The lead opinion in *White, supra* at 315, n 3, applied this test to determine if a special relationship existed between a police officer and a private individual. The lead opinion, however, declined to opine whether it should be applied to other government employees. *Id.*

³ The Michigan Supreme Court granted leave in *Reno* limited to the issues (1) “whether the Court of Appeals erred in holding that the defendant had no special relationship and owed no duty to plaintiff, and (2) whether the trial court clearly erred by holding that the plaintiff had failed to present a material fact question regarding defendant's gross negligence,” *Reno, supra*, 457 Mich at 863.